No. 243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

JULIUS H. WOLPE, ET AL., *Petitioners,*

v.

HARRY PORETSKY, ET AL., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

LOUIS OTTENBERG,
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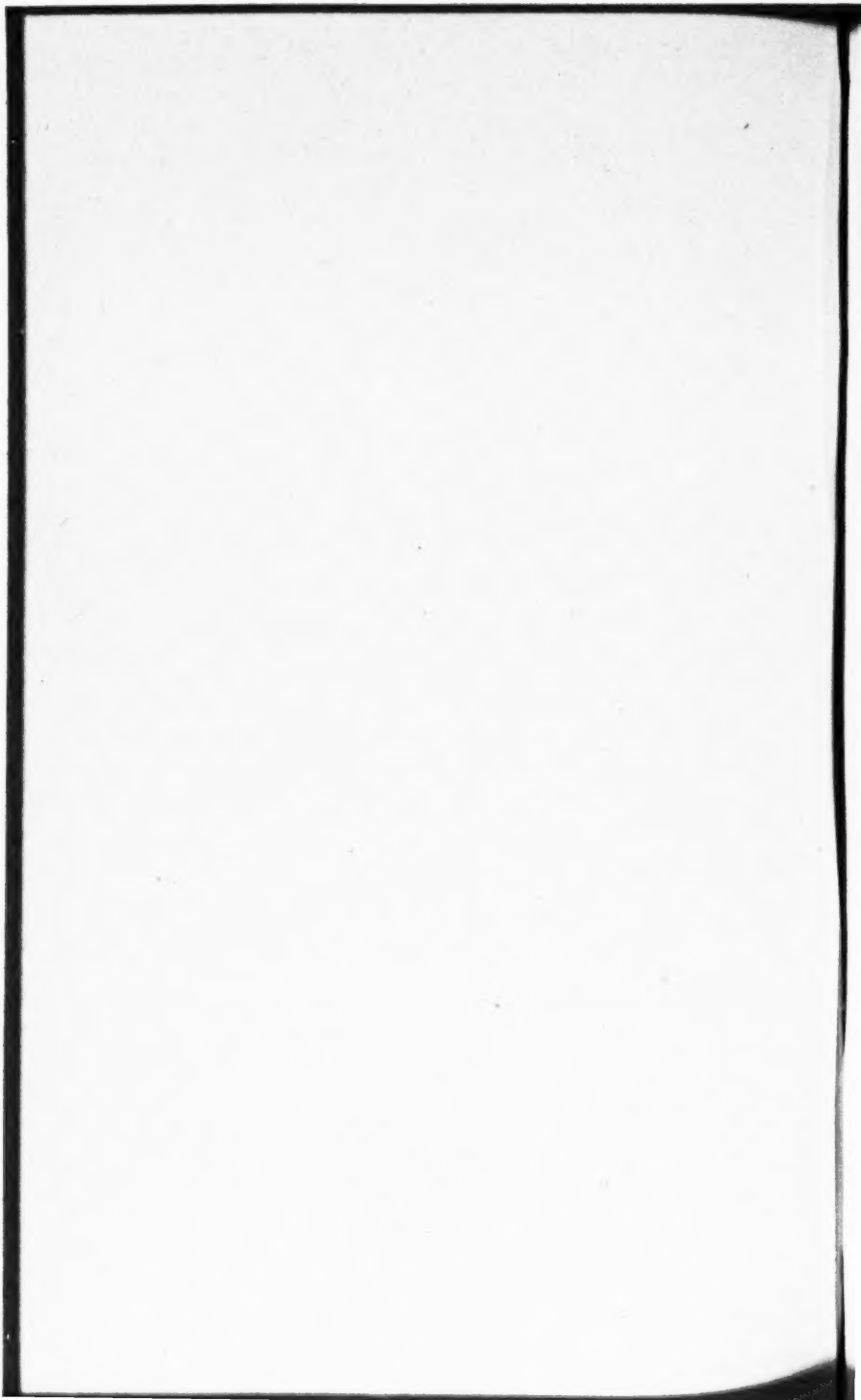

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STATEMENT OF MATTER INVOLVED.

This case involves a simple question of fact—the restoration of the zoning of a city block known as Parcel 70/100 in the District of Columbia. A single piece of property was arbitrarily re-zoned by the Zoning Commission (R. 154). Its action was vacated by the District Court and this was affirmed on appeal. That no question of general or public importance is involved, is evidenced by the fact that the Zoning Commission refused to take any appeal (R. 75). The litigation followed established local procedure. The question involved is moot.

FACTUAL SUMMARY.

Pursuant to the Zoning Act[1] the Zoning Commission established a comprehensive plan of zoning in 1920 under which the center line of Shepherd Street, Northwest, between 14th Street and 17th Street was made the dividing line between single family dwellings to the North and multiple dwellings or apartment sites to the South. Parcel 70/100 is located at 16th and Shepherd Streets, Northwest, in the southern or apartment area. From 1920 to 1941, some or all of said Parcel could have been used for apartment purposes and from 1933 to 1941 all of it was zoned for that use. The Parcel is separated from all present and probable future housing by public parks and public streets (R. 154). The unusual topographical elevation of the Parcel showing its practical utilization as an apartment site and its impracticability for use for detached single-dwelling residences appears at large in Findings of Fact IX (R. 53-54 and 103-107). "The lot is therefore an exceptionally appropriate site for an apartment house" (R. 154).

After respondent Poretsky had made a careful investigation of the zoning history and availability of the Parcel as an apartment house (R. 49-50), and after he had contracted to purchase the Parcel as an apartment site and spent more than $25,000.00 on account of deposits on the purchase price, plans, financing, engineering, etc. (R. 51), and after he had filed his application and plans for an apartment building on this site (R. 51) the Zoning Commission in November, 1941, without attempting a comprehensive change of said zoning plan arbitrarily and capriciously (R. 55) singled out this Parcel for re-zoning from an apartment use to detached single-dwelling use (R. 53).

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[1] "An Act to regulate the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes", approved March 1, 1920, D. C. Code 1940, Title 5, Secs. 412 et seq.

Poretsky then instituted this action against the Zoning Commission in the District Court of the United States for the District of Columbia for the restoration of the apartment zoning (R. 3-12). That Court held that "The erection of an apartment building upon this property would not impair the health, safety, morals, convenience, order, prosperity or general welfare of the surrounding area or the District of Columbia" (R. 55), and that "The action of the Zoning Commission in re-zoning Parcel 70/100 on November 7, 1941, as aforesaid, was unreasonable, arbitrary, capricious and void, and should be vacated and set aside" (R. 55).

In compliance with the Court's order, the Zoning Commission in April, 1943, restored zoning of the Parcel as an apartment site and decided not to appeal (R. 75).

Thereafter the present petitioners were permitted to intervene and appeal the judgment of the District Court (R. 78-79), which judgment was then affirmed by the United States Court of Appeals for the District of Columbia (R. 153-154). Each of said Courts viewed the Parcel before rendering judgment (R. 102, 112, 154).

ARGUMENT.

1. The Findings of the trial Court show clearly and definitely that the action of the Zoning Commission in destroying the apartment zoning of the Parcel in November, 1941, was not an exercise by that body of its lawful power to prevent an injurious invasion of an area, but was an unreasonable, arbitrary and capricious attempt to single out a particular Parcel and forbid its use under an established zoning. This was an unwarranted invasion of the rights of respondent under the circumstances of this case. *Nectow* v. *Cambridge*, 277 U. S. 183, 72 L. ed. 842, 48 S. Ct. 447.

The Zoning Commission acts under the police power. But this is not unlimited, and when the Commission transcended that power to the injury of a citizen, its action was

subject to the review by the Courts. *Nectow* v. *Cambridge, supra.*

The District Court held that the action of the Zoning Commission had been "arbitrary and unreasonable" (R. 55). The Court of Appeals said (R. 154):

> "We find nothing, either in the record or on a view of the premises, which tends to support the order. Even apart from the housing shortage, it would have borne no positive relation to the public welfare and would have been arbitrary and unreasonable. In view of the acute housing shortage it bore a negative relation to the public welfare. The District Court was clearly right in setting it aside, and the Commission has properly acquiesced in the correction of its error."
>
> F. R. C. P. Rule 52 (a).

This was no substitution of the opinion of those Courts for the opinion of the Zoning Commission. That body had illegally invaded the rights of the respondents and "since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained." *Nectow* v. *Cambridge, supra.*

2. When respondent Poretsky filed his action for injunctive and other relief (R. 3-12) he followed a procedure long established in the District of Columbia and approved by the Court of Appeals. *Bugher* v. *Gottwals,* 60 App. D. C. 340, 54 F. (2d) 451; *Dorsey* v. *Gottwals,* 61 App. D. C. 41, 57 F. (2d) 407; *Garrity* v. *District of Columbia,* 66 App. D. C. 256, 262 and footnote, 86 F. (2d) 207; *Hazen* v. *Hawley,* 66 App. D. C. 266, 272, 86 F. (2d) 217, cert. den. 299 U. S. 613, 81 L. ed. 452.

The Supreme Court has recently held:

> "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.

"Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. District of Columbia v. Pace, 320 U. S. 698, 702; Busby v. Electric Utilities Union, 323 U. S. 72, 74-5. The policy of deferring to the District's courts on local law matters is reinforced here by the fact that the local law now challenged is long established and deeply rooted in the District."

Fisher v. *United States,* No. 122. October Term, 1945, decided June 10, 1946, loc. cit. P. 10.

The question of the administrative remedy was not raised in petitioners' motion for leave to intervene or their intervening petition. It was raised for the first time on the appeal. It has no place or pertinency here.

Furthermore, there is nothing in the zoning law in the District of Columbia, *supra,* indicating finality in the determinations of the Commission, but, as stated in the *Dorsey* case, *supra,* the action of the Zoning Commission will receive judicial scrutiny and decision where the action of the Commission interferes with the general rights of a landowner without regard to public safety, morals or general welfare.

3. By its unanimous action of April 8, 1943, the Zoning Commission made the decision of the Court its decision, and it restored the apartment zoning of Parcel 70/100 which had existed since 1933 (R. 75). That was the object of the suit. With that object accomplished, no further controversy existed.

Commercial Cable Co. v. *Burleson,* 250 U. S. 360, 63 L. ed. 1030.
Alejandrino v. *Quezon,* 271 U. S. 528, 70 L. ed. 1071.
United States v. *Alaska S. S. Co.,* 252 U. S. 113, 64 L. ed. 808.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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